

ESTTA Tracking number: **ESTTA769101**

Filing date: **09/07/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063588
Party	Defendant Go Daddy Operating Company, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Date	09/07/2016
Attachments	Go Daddy Motion to Dismiss Amended Petition for Cancellation with Prejudice.pdf(33442 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,558,989

Mark: GO DADDY

Date of Registration: April 9, 2002

KIMBERLY SIMMONS)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92063588
)	
GO DADDY OPERATING)	
COMPANY, LLC)	
)	
Registrant.)	

GO DADDY’S MOTION TO DISMISS
AMENDED PETITION FOR CANCELLATION WITH PREJUDICE

Registrant Go Daddy Operating Company, LLC (“GoDaddy”), moves pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP § 503 to dismiss Petitioner Kimberly Simmons’ (“Simmons”) Amended Petition For Cancellation of U.S. Reg. No. 2,558,989 because, even after amendment, Simmons still lacks standing to assert a claim for cancellation, and because Simmons still fails to allege facts sufficient to support a plausible claim that GoDaddy committed fraud in obtaining its trademark registration.

I. STATEMENT OF FACTS

On April 8, 2016, Simmons sought to cancel GoDaddy’s incontestable registration for the GO DADDY trademark (U.S. Reg. No. 2,558,989) (the “GoDaddy Registration”).

On June 3, 2016, GoDaddy filed its Motion to Dismiss Simmons' Petition for Cancellation under Fed. R. Civ. P. 12(b)(6) and TBMP § 503 for lack of standing, and for failure to state a claim upon which relief could be granted.

The Board granted GoDaddy's motion to dismiss on July 11, 2016, finding that Simmons failed to adequately plead standing and failed to plead a legally sufficient ground for cancellation, and allowing Simmons to file an Amended Petition to Cancel. July 11, 2016 Order, Dkt. 13 ("Order") at 4, 7. In the same order, the Board granted Simmons a 30-day leave period in which to amend her petition. *Id.* On July 28, 2016, Petitioner filed an amended Petition to Cancel ("Amended Petition").¹ As discussed in the following sections, the Amended Petition once again fails (a) to show standing under requirements of Section 14 of the Lanham Act, (b) to allege elements sufficient to cancel a registered mark, and (c) to meet the required pleading standard for fraud under Fed. R. Civ. P. 9(b).

II. ARGUMENT

A. Legal Standard

The Board should dismiss a cancellation petition for failure to state a claim when the petition fails to establish: (1) the petitioner has standing to maintain the proceeding; and (2) a valid ground exists for canceling the subject registration. TBMP § 503.02; *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (C.C.P.A. 1982). In order to survive a motion to dismiss, the petitioner must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to meet this burden. *Ashcroft*

¹ Simmons also filed an Amended Petition to Cancel on July 26, 2016. Pursuant to the Board's August 15, 2016 Order, GoDaddy will treat the June 28, 2016 Petition as Simmons' Amended Petition to Cancel ("Amended Petition"). August 15, 2016 Order Dkt. 21 at 1.

v. Iqbal, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). *See also, Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 1927-29 (T.T.A.B. 2014) (motion to dismiss applicant's fraud, non-use and abandonment counterclaims granted). When deciding a motion to dismiss for failure to state a claim, the Board should accept all of the petitioner's well-pleaded complaints as true and the petition should be construed in the light most favorable to the petitioner. TBMP § 503.02; *Bayer Consumer Care AG v. Belmora LLC*, 90 U.S.P.Q.2d 1587, 1590 (T.T.A.B. 2009). Here, even in the light most favorable to Simmons, the Amended Petition once again states no facts that can reasonably support her claim, and as a result her petition should be dismissed with prejudice.

B. Simmons Lacks Standing to Challenge the GoDaddy Registration

Standing is a threshold issue that must be alleged and proven in a cancellation action. *Lipton*, 670 F.2d at 1026. Section 14 of the Lanham Act, 15 U.S.C. § 1064, grants standing to cancel a registration to "any person who believes that he is or will be damaged" by the registration of the mark. Although the statutory threshold for establishing standing is low (a belief that the petitioner would suffer damage), the Federal Circuit has held that at a minimum, the petitioner must allege facts to show a "real interest" in the proceeding, and a "reasonable basis" for its belief that it would suffer some kind of damage as a result of the registration. *See* TBMP § 309.03(b); *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1025-28 (Fed. Cir. 1999). Simmons cannot meet either of these requirements.

Simmons once again fails to establish that she has a real interest in the proceeding. The "real interest" element requires that the petitioner have a direct and personal stake in the outcome of the cancellation, and not be a "mere intermeddler." *Ritchie*, 170 F.3d at 1095. The Amended Petition still fails to identify how the GoDaddy Registration impairs Simmons'

interests, how those interests are different from interests of mere intermeddlers, how the alleged theft of the “idea” gives Simmons a real interest in the cancellation of the GoDaddy Registration, how GoDaddy Registration prevents Simmons from using the “stolen idea,” or how Simmons is in a position to use the GO DADDY trademark. Because Simmons does not provide any additional facts which may show that she has “real interest” in this proceeding, the Board should once again determine that Simmons lacks that interest. Order at 4.

Simmons also fails to show that she has a non-subjective belief that she will be damaged by the GoDaddy Registration, and her allegations about damages are not reasonable. To survive a motion to dismiss, the Petition must allege facts that are more than a subjective belief, instead, the belief must have a “reasonable basis in fact.” *Ritchie*, 170 F.3d at 1095. In her Amended Petition Simmons continues to allege a theft of an idea, but now specifies that her idea was to come out with her own “line of Products, Flat Panel TV, Computers, etc., that [she] invented and reinvented” or “for other companies etc., to start a website online for their companies etc.” See Simmons’ Amended Petition. As with the initial Petition, the Amended Petition provides no detail as to how a theft of these ideas resulted in the GoDaddy Registration. Even accepted as true (which GoDaddy disputes), Simmons’ Amended Petition fails, as trademarks do not protect ideas, and the Lanham Act provides no remedy. Further, and even if Simmons had an “idea” for a trademark, Board aptly noted that “merely having an idea for a mark is insufficient” for its registration. Order at 4. Accordingly, the Board should once again determine that Simmons’ claims lack reasonable basis in fact. *Id.*

As Simmons has pled no facts to establish that (a) she has a real interest in the proceedings; or (b) there is a reasonable basis for the belief, the Amended Petition should be dismissed for lack of standing.

C. Simmons' Claim of Fraud Fails to Allege Elements Sufficient to Cancel a Registered Mark and to Meet the Required Pleading Standard

Even if Simmons had standing to assert her claim, Simmons' Amended Petition fails to allege the required elements of fraud. To properly plead fraud in a cancellation action, the petitioner must establish that the applicant "knowingly made a false, material representation of fact in connection with an application to register with the intent of obtaining or maintaining a registration to which it is otherwise not entitled." *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (reversing cancellation because there was no evidence of intent to deceive); *see also Dragon*, 112 U.S.P.Q.2d at 1927-29 (motion to dismiss granted for failure to allege fraud with particularity). A party seeking cancellation of a trademark registration for fraud bears a heavy burden because "absent the requisite intent to mislead the PTO, even a material misrepresentation would not qualify as fraud under the Lanham Act warranting cancellation." *In re Bose*, 580 F.3d at 1243 (citing *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 1011 n.4 (C.C.P.A. 1981)).

In petitioning to cancel on grounds of fraud, a petitioner must also allege the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b). "[T]he pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud." *Asian & Western Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478, 1478 (T.T.A.B. 2009) (quoting *King Auto.* 667 F.2d at 1010). The Board previously held that Simmons failed "to identify any specific statement that [GoDaddy] or its predecessors-in-interest made in connection with the application [. . .] upon which she bases her fraud claim." Order at 4. Further, the Board noted that Simmons "otherwise failed to set forth a specific factual basis for" the claim of fraud in that she "possessed a superior or clearly established right to use the same or substantially

identical mark for the same or substantially identical goods or services as those in connection with” the GoDaddy Registration. Order at 7. Thus, even if Simmons were to allege a material misrepresentation by GoDaddy (which she did not), Simmons’ claim of fraud would still fail because Simmons never possessed a superior or clearly established right to use the same or substantially identical mark for the same or substantially identical goods or services as those in connection with” the GoDaddy Registration.

As Simmons has pled no facts to establish that (a) GoDaddy knowingly made a false, material representation of fact and that (b) Simmons had clearly established right to use the same or substantially identical mark as GoDaddy, the Amended Petition should be dismissed for failure to plead a legally sufficient ground for cancellation of the GoDaddy Registration.

D. Allowing Further Amendment Serves No Useful Purpose

Allowing Simmons another opportunity to amend her petition will serve no useful purpose, and therefore should not be allowed. The amendment serves no useful purpose when proposed amended claims lack essential elements. *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 U.S.P.Q. 151, 154 (T.T.A.B. 1983) (“Although it is the general practice of the Board to allow a party an opportunity to correct a defective pleading, in the instant case leave to amend the pleading would serve no useful purpose”), *aff’d*, 739 F.2d 624, 222 U.S.P.Q. 741 (Fed. Cir. 1984). Further, where Petitioner has been given an opportunity to amend, and the Board can perceive no theory by which the recited facts could be plausibly alleged to constitute fraud, another leave to re-plead is inappropriate. *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 1929 n.10 (T.T.A.B. 2014)(denying opportunity to replead counterclaims a third time).

Here, Simmons has already had one opportunity to amend her petition. As explained above, Simmons failed to add any additional information to show that she has standing to

challenge the GoDaddy Registration or to allege the required elements of fraud. In addition, there appears to be no theory by which the recited facts could plausibly constitute fraud. Thus, the Board should not permit Simmons to have a third bite of the apple and should dismiss Simmons' claims with prejudice.

III. CONCLUSION

Simmons' Amended Petition fails to provide any facts that establish her direct and personal stake in the outcome of the cancellation proceeding and fails to state a reasonable basis for her belief that she is and will be damaged by the GoDaddy Registration. Thus, Simmons has no standing in this action. Even if Simmons had standing, Simmons fails to allege the elements of fraud generally, must less with the required particularity. For these reasons, GoDaddy's Motion to Dismiss should be granted with prejudice and Simmons should be barred from filing further cancellation actions against Go Daddy's trademark registrations without first obtaining leave of the Board.

Dated: September 7, 2016

By: /s/ Nicole M. Murray

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CERTIFICATE OF SERVICE

Pursuant to T.B.M.P § 113.03, I hereby certify that a true and complete copy of the foregoing GoDaddy's Motion to Dismiss Amended Petition for Cancellation with Prejudice has been served on Kimberly Simmons by emailing and mailing said copy on September 7, 2016, via U.S. Mail to:

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